

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARMA H. BARB)	
Claimant)	
VS.)	
)	Docket No. 210,725
INTERSTATE BRANDS CORP.)	
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent requested review of the Award dated March 5, 1997, entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on August 13, 1997, in Topeka, Kansas.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. James C. Wright of Topeka, Kansas, appeared for respondent. Jeff K. Cooper of Topeka, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUE

The Special Administrative Law Judge awarded claimant permanent total disability benefits. Respondent requested the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record the Appeals Board finds as follows:

The Award should be affirmed.

The parties stipulated claimant, who was 58 years old at the time, sustained personal injury by accident arising out of and in the course of her employment with respondent on February 23, 1993. On that date claimant injured her left shoulder while dumping trash.

Board-certified orthopedic surgeon Kenneth L. Wertzberger, M.D., treated claimant and performed surgery on her left shoulder on three separate occasions to treat a rotator cuff tear and adhesive capsulitis. As described by Dr. Wertzberger, the outcome of the three surgeries was dismal. Claimant now experiences debilitating pain upon any movement of her left arm and is oftentimes forced to recline in a chair to obtain relief from her pain. Claimant testified she has not found any pain medications which have helped. The parties stipulated claimant now has a 15 percent whole body functional impairment as a result of the work-related accident.

The Special Administrative Law Judge found claimant was permanently, totally disabled. The Appeals Board agrees with that conclusion.

The greater weight of evidence establishes that claimant has suffered a severe debilitating injury as a result of her accident. As early as November 1994, the treating physician, Dr. Wertzberger, indicated he did not believe claimant was employable. Claimant's condition has objectively worsened after that date. Respondent's expert medical witness, board-certified orthopedic surgeon Daniel M. Downs, M.D., indicated claimant was unable to tolerate any reaching or lifting greater than one pound with the left arm and that claimant has had to modify how she performs simple tasks of daily living.

Claimant's vocational rehabilitation expert, Richard W. Santner, testified he does not believe claimant is employable in any capacity. He does not believe he could find claimant any substantial and gainful employment. Respondent's vocational rehabilitation expert, Michael J. Dreiling, indicated claimant has little transferable work skills and "[a]ny attempts at employment would have to be through a very selective placement program and with a very understanding and accommodating employer." In the conclusion to his report dated August 14, 1996, Mr. Dreiling wrote:

Based upon the medical advice of Dr. Downs and Dr. Wertzberger, it is my vocational opinion that from a realistic perspective, it will be difficult for this individual to return back to work in the competitive labor market on a full time basis. Eliminating the use of her left upper extremity as suggested by the physicians will be quite limiting given this individual's educational background, work background and current labor market.

Hypothetically it may be possible to come up with some type of accommodated or very selective job placement activity which would permit this individual to return back to work in the labor market in some type of accommodated position, but realistically I do not consider it feasible. Given the nature of her work background and significant medical problems as described by the physicians, her vocational opportunities are quite limited. . . .

In summary, it is my opinion that from a realistic vocational impression it will be difficult for this individual to return back to work in the competitive labor market on a full time basis. Any attempts at employment would have to be through a very selective placement program with a very understanding and accommodating employer. She has not acquired any significant transferrable skills through the performance of her work or through her academic endeavors in the past.

When considering the entire record, the Appeals Board finds claimant is essentially and realistically unemployable and incapable of engaging in any type of substantial and gainful employment and, therefore, claimant is entitled to receive permanent total disability benefits under the provisions of K.S.A. 1992 Supp. 44-510c. See Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

The Appeals Board hereby adopts the Special Administrative Law Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 5, 1997, entered by Special Administrative Law Judge William F. Morrissey, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Appeals Board Member respectfully dissents from the opinion of the majority in the above matter. The majority has awarded claimant permanent total disability as a result of an injury to her nondominant left shoulder. Claimant had medical restrictions to the left shoulder due to complaints of pain and limited motion to the shoulder. Claimant is a right-handed individual with completely unrestricted use of her right hand, arm, and shoulder. She has full use of her left hand and arm up to the elbow without any symptoms or problems. Both Kenneth L. Wertzberger, M.D., the treating physician, and Daniel M. Downs, M.D., a board-certified orthopedic surgeon, acknowledge claimant is able to perform unrestricted work with the right upper extremity.

The only basis for claimant being awarded permanent total disability is her allegations that her pain is so severe that she is unable to function on a regular basis. Claimant contends she must periodically sit in a recliner in order to overcome the severe ongoing pain symptomatology. This testimony, in light of the fact that claimant takes no pain relievers of any kind, either prescription or over-the-counter, is a contradiction.

The vocational evidence from Michael J. Dreiling indicates claimant is capable of earning between \$4.25 and \$5.00 per hour as a start in the Emporia area. Richard W. Santner, the claimant's vocational disability expert, found claimant to have a 90 percent loss of market access based upon the restrictions of Dr. Wertzberger, the treating physician. He did acknowledge that claimant had worked for a week doing light clerical duties for respondent, although, this was prior to the last surgery.

In Workers Compensation litigation, the burden of proof is upon claimant to establish claimant's right to an award of compensation by proving the various conditions upon which the claimant's right depends. See K.S.A. 1992 Supp. 44-501.

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 1992 Supp. 44-508(g).

In this instance, this Appeals Board Member is not persuaded that claimant's allegations of ongoing pain are supported by the record. While it is acknowledged she has significant limitations to her left shoulder, these limitations are limited solely to the left shoulder and she is prohibited from performing physical activities with no other part of her body as a result of this injury. As such, this Appeals Board Member would not find claimant to be permanently totally disabled as there is sufficient evidence in the file to show claimant capable of earning income in the open labor market, even with her significant limitations to the left shoulder. Pain complaints which claimant makes absolutely no attempt to alleviate should not be the basis for a permanent total disability award.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
James C. Wright, Topeka, KS
Jeff K. Cooper, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director